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IN THE

Supreme Court of the United States

October Term, 1949.
Nos. 594 and 613.

J. HOWARD McGRATH, Attorney General of the United States, as Successor to the Alien Property Custodian, and MAURICE C. SPARLING, Superintendent of Banks of the State of California, as Liquidator of the Business and Property of THE YOKOHAMA SPECIE BANK, LTD., SAN FRANCISCO, with a Branch in Los Angeles, in Liquidation,

Petitioners,

vs.

PARAMOUNT PICTURES INC., BANK OF AMERICA NATIONAL TRUST AND SAVINGS ASSOCIATION, a National Banking Association, LOEW'S INCORPORATED, a Delaware Corporation, and UNIVERSAL PICTURES COMPANY, INC., a Delaware Corporation,

Respondents.

BRIEF OF RESPONDENT PARAMOUNT PICTURES INC. IN OPPOSITION TO PETITIONS FOR WRIT OF CERTIORARI.

Foreword.

In the interest of brevity, petitioner J. Howard McGrath, Attorney General of the United States, as Successor to the Alien Property Custodian, will be hereinafter referred to as "McGrath"; petitioner Maurice C. Sparling, Superintendent of Banks of the State of California, as Liquidator of the Business and Property of The Yokohama Specie Bank, Ltd., San Francisco, with a Branch in Los Angeles, in Liquidation, will be referred to as "Sparling"; respondent Paramount Pictures Inc. will be some-

times referred to as "Paramount"; the Superintendent of Banks of the State of California will be sometimes referred to as "the Superintendent of Banks"; the Alien Property Custodian sometimes as "the Custodian"; The Yokohama Specie Bank, Ltd., San Francisco, with a branch in Los Angeles, in liquidation, sometimes as "the Bank"; and the District Court of Appeal of the State of California as "the appellate court."

Statement of the Case.

The statements of facts (excluding the conclusions interspersed therein) embodied in the petition of McGrath and in the brief filed by Sparling supporting his petition are substantially correct, except that they omit certain material facts which will be supplied in the course of the argument which follows. Moreover, the question presented for review by this Court as set forth in the petition of Sparling at pages 3 and 4 and in his brief at pages 10 and 11 has been fairly expressed.

On the other hand, the discussion and statement of the questions allegedly presented contained in the petition of McGrath (McGrath Petn., pp. 2-4) are misleading and inaccurate. The appellate court did not rest its determination that respondents were entitled to interest on their deposits from the date when each fell due (but not earlier than December 8, 1941) upon the *sole*[1] ground that the Bank's officers had not acted "in good faith" within the meaning of Section 5(b)(2) of the Trading With the Enemy Act, as the McGrath petition declares. (Mc-

[1]Emphasis here, as elsewhere, has been added unless otherwise noted.

Grath Petn., p. 3.) Its determination rested upon two grounds, which it considered separately: (1) That timely payment of respondents' claims by the Bank was not excused under Sections 5(b)(2) and 7(e) of the Act,[2] and (2) that such payment was not prevented by impossibility arising from the operation of law. [R. 516-522.] The first ground is the federal ground of the decision. The second ground, to wit, that performance of the Bank's contracts to pay respondents' deposits when due was not rendered impossible by operation of law, is a non-federal ground of the decision, since it is state law which must be applied to determine the sufficiency of a substantive defense to a contract. *Erie Railroad Co. v. Tompkins,* 304 U. S. 64, 78; *United States v. Brookridge Farm,* 10 Cir., 111 F. 2d 461, 464; *Metropolitan Life Insurance Co. v. Kane,* 7 Cir., 117 F. 2d 398, 400. Consequently, this Court may examine only the first or federal ground of decision below and may not inquire into the adequacy of the second or non-federal ground. *Murdock v. City of Memphis,* 87 U. S. 590, 626, 631; *Sauer v. City of New York,* 206 U. S. 536, 545-547.

The McGrath petition is further in error when it asserts at page 3 that the appellate court construed "good faith" as requiring a showing by the party claiming exoneration

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[2]Unlike Section 5(b)(2), the exculpatory clause embraced in Section 7(e) of the original Trading With the Enemy Act of October 6, 1917, 50 U. S. C., Sec. 7(e), does not include an express condition of good faith. However, Section 7(e) was for all practical purposes superseded by Section 5(b)(2), as amended on December 18, 1941, by the First War Powers Act, 55 Stat. 839, 50 U. S. C., App., Sec. 616(2). Hence, Section 5(b)(2) is the controlling section for the entire period during which interest has been awarded to respondents except for the brief ten day interval between December 8, 1941, and December 18, 1941.

that he did everything possible to secure relief from the Government's order by holding that proof that it was established Treasury Department policy after Pearl Harbor to deny all applications for licenses to operate Japanese-owned banks was insufficient, absent a further showing that an application was actually pressed to the personal attention of the Secretary of the Treasury and rejected by him. In so far as the appellate court may be said to have required such a showing, it did so only in upholding its second non-federal ground of decision; namely that, the burden of proving impossibility of performance had not been sustained. [R. 520-522.] Respecting the construction of the phrase "good faith," it relied entirely upon the proposition that because the trial court had found "that there was nothing to prevent these officers from applying for a special license to pay the creditors of the bank or these plaintiffs and as a conclusion of law that their failure to do so showed an absence of 'good faith' of Section 5(b)(2) of the Trading With the Enemy Act, . . . in view of the evidence produced on cross-examination establishing the power of the officers of the bank after internment to make application for a license we cannot hold that the finding and conclusion of the trial court on this subject are not supported by the evidence." [R. 520.] For these reasons the second question allegedly presented for decision as framed on page 4 of the McGrath petition is a wholly incorrect statement reflecting a confusion of the federal and non-federal grounds of decision below.

Summary of the Argument.

1. This Court should not grant certiorari to review the determination of fact made by the trial court that the officers of the Bank showed an absence of "good faith" of Section 5(b)(2) of the Trading With the Enemy Act in failing to attempt to obtain a license authorizing the Bank to continue business after December 8, 1941, or a license authorizing payment of Paramount's deposits after said date, where there is substantial evidence in the record to support such determination.

2. The exculpatory clause contained in Section 5(b)(2) of the Trading With the Enemy Act could have no application after December 27, 1941, when the United States Treasury Department licensed the California Superintendent of Banks to liquidate the Bank and pay depositors in accordance with California law.

3. The Alien Property Custodian did not vest in himself any excess proceeds available for the payment of interest on respondents' deposits; hence, the Attorney General of the United States, as his successor in interest, has no claim upon the assets involved in this litigation.

ARGUMENT.

I.

This Court Should Not Grant Certiorari to Review the Determination of Fact Made by the Trial Court That the Officers of the Bank Showed an Absence of "Good Faith" of Section 5(b)(2) of the Trading With the Enemy Act in Failing to Attempt to Obtain a License Authorizing the Bank to Continue Business After December 8, 1941, or a License Authorizing Payment of Paramount's Deposits After Said Date, Where There Is Substantial Evidence in the Record to Support Such Determination.

The issue of good faith was made the subject of specific findings of fact by the trial court. After finding that the Bank's four officers had been interned in various detention camps on or immediately after December 8, 1941, and for a period of some months thereafter, the trial court further found as follows:

> "Under the regulations in force at all of these camps detainees were allowed to confer with members of their families, their attorneys, or other persons having a legitimate reason to visit them; to send and receive communications, subject to censorship for anything harmful to the interests or safety of the United States; to appear in court under guard for good cause shown; and to execute any ordinary legal document. During the above mentioned periods that said officers, and each of them, were in said detention camps, there was nothing to deter or prevent them, or any of them, or their attorneys or agents, from applying to the proper Federal Reserve Bank for a special license to continue the business of the Yokohama Specie Bank, Ltd., San Francisco,

with a branch in Los Angeles, after December 8, 1941, or for a special license to pay plaintiff the amount of its deposits after said date, or, in the event that said application or applications were denied, from appealing from the denial of the same to the Secretary of the Treasury pursuant to Executive Order No. 8389, as amended, and the regulations thereunder; . . . Notwithstanding, neither the Bank nor any officer, director, agent, or person acting on its behalf (excluding the Superintendent of Banks of the State of California) ever made application to the Secretary of the Treasury pursuant to Executive Order No. 8389, as amended, or to the Treasury Department or its Foreign Funds Control Division, or to any Federal Reserve Bank, for a specific Treasury Department license or licenses to continue the business of The Yokohama Specie Bank, Ltd., San Francisco, with a branch in Los Angeles, after December 8, 1941, or for a specific Treasury Department license or licenses permitting said Bank, after December 8, 1941, to engage in any transaction prohibited by said Executive Order, such, for example, as a license authorizing payment to plaintiff of its deposits." [R. 27-28.]

On the basis of these findings the trial court concluded that:

"The officers of The Yokohama Specie Bank, Ltd., San Francisco Office, as of December 7, 1941, and each of them, had an obligation to plaintiff to attempt to obtain a license authorizing The Yokohama Specie Bank, Ltd., San Francisco, with a branch in Los Angeles, to continue business after December 8, 1941, or a license authorizing payment to plaintiff of its deposits after said date, pursuant to Executive Order No. 8389, as amended, and the regulations

thereunder, and the failure of said officers, and each of them, to discharge said obligation showed an absence of 'good faith' of Section 5(b)(2) of the Trading With the Enemy Act, as amended by the First War Powers Act, December 18, 1941, c. 593, Title III, Sec. 301(2), 50 U. S. C. A., App., Sec. 616(2)."[3] [R. 31.]

There was and is ample evidence in the record to support the trial court's findings and conclusion. The ability of the interned officers, or attorneys acting on their instructions, to have obtained a form of application for a license to continue the Bank's operations or pay a depositor after December 8, 1941, filled it out, and mailed it to the proper person,[4] was undisputed. [R. 334-338.] This would have been the same Form TFE-1 [Ex. 39; R. 239, 364, 378-379] on which three of the officers had made applications for licenses prior to December 8, 1941. [R. 319-320.] The trial judge himself developed the significant testimony that none of the officers knew anything whatever about the Treasury Department's policy not to license the operation of Japanese banks or permit pay-

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[3]It is important to note that the trial court did not interpret "good faith" as requiring the officers to exhaust every conceivable means of securing relief from the order revoking the Bank's license by conducting a running battle of last-ditch resistance against the federal government's directive, as McGrath repeatedly alleges. (McGrath Petn., pp. 4, 15-16, 20-21, 28.) In order to manifest their good faith the officers need only have attempted to obtain a license *from someone* in authority. They were not obliged to apply first to the appropriate Federal Reserve Bank, and, in the event of denial, from there on all the way up the line to the Secretary of the Treasury himself in order to bring themselves within the protection of Section 5(b)(2).

[4]The proper person to whom the application should have been addressed in the first instance was the Federal Reserve Bank for the district in which the applicant resided or had his principal place of business. [Exs. 39 and 36.]

ment of their depositors outside of a liquidation after December 7, 1941. [R. 366-368.] Yet they made not the *slightest* effort to secure such a license or licenses.[5] [R. 401-402.] On this state of the record the trial judge was fully justified in concluding that the officers had not met the test of "good faith" imposed by Section 5(b)(2).

In his brief Sparling defines "good faith" as the exercise of reasonable prudence and diligence under the circumstances. (Sparling Br., p. 14.) Whether or not the officers of the Bank exercised reasonable prudence and diligence under the particular circumstances of this case in failing to seek a license is purely a question of fact, which was within the exclusive province of the trial judge, sitting without a jury, to determine.[6] The argument of petitioners amounts to no more than that the trial judge should have reached a contrary conclusion on the evidence before him.

It has long been a firmly established rule that the decision of a state court upon a question of fact will not be made the subject of inquiry by this Court where there

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[5]McGrath makes a minor point of the fact that respondents made no attempt to obtain licenses on their own account. (McGrath Petn., pp. 12-13, 16.) This is immaterial, since the good faith of respondents is not in issue. The question presented is whether the *Bank* "omitted in good faith" to pay its depositors in reliance on a direction issued under the Trading With the Enemy Act. Furthermore, the obligation to obtain a license rested with the Bank, and not with the depositors. *Fujikawa v. Sunrise Soda Water Works Co.*, 9 Cir., 158 F. 2d 490, 492, cert. denied 331 U. S. 832, rehearings denied 332 U. S. 785, 853; *Dezsofi v. Jacoby*, 178 Misc. Rep. 851, 36 N. Y. S. 2d 672, 674; *cf. United States Trading Corp. v. Newmark Grain Co.*, 56 Cal. App. 176, 205 Pac. 29, 32.

[6]The presence or absence of "good faith" has always been recognized as a question of fact for the trial court. See, for example, *Kenniff v. Caulfield*, 140 Cal. 34, 73 Pac. 803, 805; *Bumgarner v. Orton*, 63 Cal. App. 2d 841, 146 P. 2d 67, 69; *Vesper v. Ashton*, 118 S. W. 2d 84, 89.

is substantial evidence in the record to support the state court's decision.

Thus, in *Great Northern Ry. Co. v. Donaldson,* 246 U. S. 121, 123-124, this Court held that it was not its province to weigh conflicting testimony, and where the record showed testimony supporting the decision, that was as far as the Court entered upon a consideration of the question.

In *Yosemite Gold Mining & Milling Co. v. Emerson,* 208 U. S. 25, it further held that a decision of a state court holding that the decision of the trial court on a question of fact on conflicting evidence was conclusive on appeal, did not amount to a denial of a federal right so as to give the United States Supreme Court a right to review the decision of the state supreme court.

To the same effect are *Chrisman v. Miller,* 197 U. S. 313, 319 ("In cases coming from a state court we do not review questions of fact, but accept the conclusions of the state tribunal as final"); *Grayson v. Harris,* 267 U. S. 352, 357-358; *Merchants Mutual Automobile Liability Ins. Co. v. Smart,* 267 U. S. 126, 131-132; *Telluride Power Transmission Co. v. Rio Grande Western Ry. Co.,* 187 U. S. 569, 584; *cf. General Talking Pictures Corp. v. Western Electric Co.,* 304 U. S. 175, 178.

Two additional considerations bearing upon the issue of good faith should be called to the Court's attention. In *Fujikawa v. Sunrise Soda Water Works Co.,* 9 Cir., 158 F. 2d 490, interest at the legal rate was awarded to depositors of a Japanese owned bank under circum-

stances almost identical with those of the instant case. Among other things the Ninth Circuit Court of Appeals held at page 494 of its opinion that the failure of the bank's officers to endeavor to obtain a license permitting a limited operation of the bank after Pearl Harbor Day showed an absence of "good faith" of Section 5(b)(2) of the Trading With the Enemy Act. A writ of certiorari to review this decision was denied in 331 U. S. 832, and two applications for a rehearing were likewise denied in 332 U. S. 785, 853.[7]

Secondly, quite apart from the presence or absence of good faith on the part of its officers, the *Bank* was guilty of bad faith in failing to make timely payment of respondents' deposits. In this connection the trial court made the following findings of fact [R. 24-26], which are supported by the evidence:

In mid 1940 the Imperial Japanese Household owned between one-fourth and one-half of the Bank's capital stock; the election of its directors was subject to approval by the Japanese Minister of Finance; and at all times material to this controversy prior to December 8, 1941, it was an official fiscal agent and under the general control of the Japanese Government. [R. 409-411.] On December 7, 1941, immediately after the Japanese attack on Pearl Harbor and as a direct and proximate consequence thereof, the Treasury Department issued Public Circular

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[7]The only possible ground for distinguishing the *Fujikawa* case is that it cannot be ascertained from the opinion whether or not the Japanese bank officials there involved were placed under restraint.

No. 8, which revoked General License No. 69, thereby reimposing all the prohibitions of Executive Order No. 8389 upon the Bank [Ex. 40; R. 215-216], said attack also being directly responsible for the action of the Superintendent of Banks in taking possession of the Bank's property and business. [R. 225.]

In short, the Bank was an agent of the Japanese government, which ordered the sneak attack on Pearl Harbor, which in turn precipitated the revocation of the Bank's license by the Treasury Department and the seizure of its property and business by the Superintendent of Banks.

In view of the foregoing dissertation it becomes apparent that neither the trial court nor the appellate court has emasculated the protection from liability afforded by the exculpatory clauses of the Trading With the Enemy Act or reversed the salutary rule of the cases which have applied them under proper conditions, as petitioners charge. (McGrath Petn., p. 20; Sparling Petn., p. 5.) The trial court has simply decided that under the special facts of this case the Bank did not "omit" to pay its depositors "in good faith," wherefore Section 5(b)(2) does not provide exoneration. The appellate court has held this decision to be supported by the evidence. As hereinabove shown this is a factual matter which should not be reviewed by this Court.

II.

The Exculpatory Clause Contained in Section 5(b)(2) of the Trading With the Enemy Act Could Have No Application After December 27, 1941, When the United States Treasury Department Licensed the California Superintendent of Banks to Liquidate the Bank and Pay Depositors in Accordance With California Law.

Petitioners argue substantially that the Bank cannot be held liable for damages in the form of interest for failure to pay respondents' deposits when due because it "omitted in good faith" to make such payments "in reliance on" a "regulation" or "direction" issued under the Trading With the Enemy Act, namely Public Circular No. 8, which revoked the Bank's general license to operate on December 7, 1941, thereby reimposing all the prohibitions of Executive Order No. 8389, as amended. (McGrath Petn., pp. 3-7; Sparling Petn., p. 3.) Paramount, on the other hand, contends that after December 27, 1941, the Bank was no longer omitting to pay respondents in reliance on a regulation issued under the Act, since on that date United States Treasury Department licenses were issued by the Federal Reserve Bank of San Francisco, acting under the direction of the Treasury Department, to the California Superintendent of Banks, authorizing him to effect all transactions ordinarily incidental to the liquidation of the property and business of the San Francisco and Los Angeles Branches of the Bank, *including payments to depositors,* in accordance with the

laws of California. [Exs. 7 and 8; R. 28.] After receiving these licenses the Superintendent of Banks, who had succeeded to the position of the Japanese management of the Bank, was no longer prohibited by a federal regulation from paying its depositors. *On the contrary, he was now expressly authorized by the federal authorities to pay the depositors.* And, as McGrath and Sparling concede, conduct of the liquidation proceedings by state officers pursuant to federal authorization has continued from December 27, 1941, down to the present time. (McGrath Petn., p. 11; Sparling Petn., p. 4.)

It follows that at least from December 27, 1941, on, the liability of the Bank for interest was dependent, not upon any theory of action or non-action by the Bank or its officers, but upon California law as to the rights of depositors and creditors of a bank in liquidation. Under settled California law, if any assets remain after the claims of all depositors and creditors of the bank have been paid, such assets are to be applied to the payment of interest on the claims at the legal rate of 7% per annum from the date of suspension of business to the date of payment before any distribution is made to the stockholders. California Banking Code, Section 3122; *Greva v. Rainey,* 2 Cal. 2d 338, 41 P. 2d 328, 333-334.

III.

The Alien Property Custodian Did Not Vest in Himself Any Excess Proceeds Available for the Payment of Interest on Respondents' Deposits; Hence, the Attorney General of the United States, as His Successor in Interest, Has No Claim Upon the Assets Involved in This Litigation.

McGrath's claim to the Bank's funds which are available for the payment of interest on respondents' deposits is founded solely upon Vesting Order No. 1324, executed April 22, 1943 [Ex. 12; R. 9-10, 211, 229], whereby the Custodian vested in himself the *excess* proceeds of the business and property of the California Branch of the Yokohama Specie Bank *after payment of the claims of creditors accepted, allowed or established in accordance with the banking law of the State of California, together with interest on such claims,* and expenses of liquidation.[8 9] [R. 13-15.]

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[8]The property vested in the Custodian was described in the Order as follows:

> "The *excess* proceeds, if any, of the business and property of the California Branch in the possession of the Superintendent of Banks of the State of California, acting in his capacity as Superintendent of Banks, Liquidator and/or Conservator, or which may hereafter come into his possession in any such capacity under and by virtue of the banking law of the State of California, owned or controlled by or payable or deliverable to or held on behalf of or on account of or owing to the California Branch remaining after payment of the claims of the creditors of the California Branch accepted, allowed or established in accordance with the banking law of the State of California, arising out of the business of the California Branch transacted in the State of California, *together with interest on such claims* and the expenses of liquidation." [R. 13.]

Said Order also provided:

> "Nothing in this order is intended to affect the right and power of the Superintendent of Banks of the State of Cali-

The trial court made the following findings of fact with respect to said Order:

". . . In and by said Vesting Order No. 1324 said Alien Property Custodian did not vest in himself the excess proceeds, if any, of the business and property of the said California Branch of The Yokohama Specie Bank, Ltd., in the possession of the Superintendent of Banks of the State of California remaining after payment of the principal of the

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fornia, acting in his capacity as Superintendent, Liquidator and/or Conservator, to continue to retain possession of, collect and liquidate such business, property and assets and, in the course of said liquidation or conservatorship, to do such acts and perform such duties (not inconsistent herewith) as may be required of or permitted to said Superintendent of Banks in his capacity as Superintendent, Liquidator and/or Conservator, as aforesaid, by and in accordance with and subject to the provisions of the Bank Act of the State of California; provided, however, that *after the claims of the creditors* of the California Branch described in subparagraph 4 hereof, *together with interest thereon* and the expenses of liquidation, *have been paid in full, the remaining assets* of the California Branch, or the proceeds thereof, in the possession of said Superintendent of Banks or to which he may be or become entitled acting in his capacity as Superintendent, Liquidator and/or Conservator, *shall be held for the account of and subject to the further order of the Alien Property Custodian.*" [R. 14.]

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[9]The wording of the Order effectively rebuts McGrath's contention that upon its issuance the Custodian became the real owner of the Bank. (McGrath Petn., pp. 23-24.)

In the same connection McGrath argues that having become the real owner of the Bank on April 22, 1943, the Custodian was under no duty to apply to himself for a license to pay respondents' deposits, and therefore there is no possible justification for paying interest after the date of vesting. (McGrath Petn., p. 25.) The simple answer to this argument is that there was no necessity for the Custodian to apply to himself for a license to pay respondents' deposits after April 22, 1943, because, as hereinbefore noted, federal permission had already been granted the Superintendent of Banks on December 27, 1941, to pay these deposits in the course of liquidation.

claims of the creditors of said California Branch accepted, allowed or established in so far as the same might be available for the payment of interest at the rate of seven per cent (7%) per anum upon the principal of said claims from the date of suspension of business, (namely, December 8, 1941) except where under the terms of the contract out of which the claim arose the due date was subsequent to the date of suspension of business in which event interest would commence to run from the due date until the date of payment of principal." [R. 29-30.]

Wherefore, it concluded that:

"Plaintiff in intervention as successor to the Alien Property Custodian, has no claim in or to any funds remaining in the hands of the Superintendent of Banks which may be available for the payment of interest as prayed in plaintiff's complaint herein, and his claims are not adverse to the claims of plaintiff herein; and plaintiff in intervention is not a proper plaintiff in intervention in this action, and he has no interest in this controversy whatever, either sufficient to enable him to assert any defenses to plaintiff's claim for interest herein, or otherwise, or at all." [R. 31-32.]

It is submitted that the trial court correctly construed the vesting order in accordance with the plain meaning of its language. It follows that since the Custodian has vested in himself only the excess proceeds *after* payment of interest on creditors' claims, McGrath, as his successor in interest, has no litigable interest in this controversy.

Conclusion.

It should not be lost sight of that the decision in this case actually turns upon the relative rights of the depositors and creditors upon the one hand and the Japanese stockholders of the Bank upon the other. This is inevitable because McGrath stands in the shoes of the stockholders. The only rights which he acquired under the Custodian's vesting order [Ex. 12] were such rights as those stockholders then possessed. Those were the only rights which he could acquire thereby.

As between the depositors and the Japanese stockholders surely the latter and not the former should bear the loss incident to the deprivation of use of the depositors' monies. Paramount and the other depositors were in no way responsible for the closing of the Bank and the long delay attendant upon its liquidation.[10] The Bank was not equally blameless, however. As previously observed it was an official fiscal agent and under the general control of the Japanese government, which started the war between the United States and Japan, which in turn brought about the revocation of the Bank's license and the seizure of its property and business.

Even if the Bank had been entirely free from fault in connection with its closing, it would seem that the risk

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[10]A first 80% dividend on the principal of their claims was not paid to depositors and creditors until on or about September 2, 1948, nearly seven years after the Bank suspended business. (Sparling Petn., p. 4.)

of unanticipated circumstances should be thrown upon it and not upon the depositors. Any bank assumes many risks when it opens its doors for business and accepts deposits. In effect it promises to repay those deposits in all events—whether times are good or bad, whether world conditions are orderly or chaotic.

For these equitable reasons and for the legal reasons hereinbefore stated, it is respectfully submitted that this case is not a proper one for review by certiorari in this Court, and that the petitions for a writ of certiorari should be denied.

Respectfully submitted,

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